IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA

RSA No. 452 of 2005

Judgment reserved on 17.4.2007

Date of decision 27.4.2007

Salig Ram Appellant

Versus

Municipal Corporation Respondent

Coram:

The Hon'ble Mr.Justice V.K.Ahuja, Judge.

Whether approved for reporting?[1] No.

For the Appellant: Ms.Seema Guleria, Advocate.

For the Respondent: Mr.Sharwan Dogra, Advocate.

V. K.Ahuja, J.

This Regular Second Appeal has been filed by the appellant-plaintiff against the judgment and decree of the court of learned Additional District Judge, Fast Court, Shimla dated 27.6.2005, vide which the judgment and decree of the learned Sub Judge Ist Class, Court No.1, Shimla dated 30.12.2000 was affirmed and the suit of the appellant-plaintiff was dismissed.

Briefly stated the facts of the case are that the appellant as plaintiff filed a suit for permanent prohibitory injunction and for direction to the defendant to reconstruct the wall unlawfully demolished on the order of the commissioner, Municipal corporation and for damages to the extent of Rs.10,000/-. The short point in dispute was that the plaintiff had raised a brick wall in Khasra No.74 on the side of the path leading to Laxmi Narain temple. The case of the plaintiff was that the defendant had no right to pass the order for demolition of the wall. A perusal of the plaint shows that the plaintiff did make a vague reference that no notice was issued but

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[1] Whether reporter of local papers are allowed to see the judgment ? Yes.

there were no specific allegation that the demolition order was passed without serving a seven days' notice upon him or without getting the land demarcated. The record shows that the construction was raised in Khasra No.74 which was proved to be a path owned by one Balak Ram. The plaintiff had claimed his ownership over khasra No.74 but there is a reference to the admission made by the plaintiff that this khasra number was not owned by him but by Balak Ram. There is no dispute that the path was being used for going to the temple but plaintiff pleaded that it was not capable of being used for vehicles.

Defendant pleaded that a building plan was submitted by the plaintiff in regard to khasra No.72 etc. in the year 1978, which was rejected, but the plaintiff carried out unauthorized construction of his building. The action was taken by the defendant as per Municipal Corporation bye laws and on appeal filed by the plaintiff, the case was remanded by Divisional Commissioner for giving opportunity to the plaintiff to be heard. During the hearing the plaintiff was asked to submit his revised plan but he failed to do so and the demolition order was passed legally and validly. Further the case of the defendant was that unauthorized construction of the wall raised by the plaintiff was obstructing the right of persons from enjoying the path and the orders were passed in accordance with law, hence the plaintiff was not entitled to any relief.

The learned trial court framed issues and finally concluded that the plaintiff had failed to prove that he was owner of khasra No.74 where the wall existed and he was held not entitled to the reliefs claimed by him. The said findings were confirmed by learned first appellate court.

I have heard learned counsel for the parties and have also gone through the record.

The submissions made by learned counsel for the appellant were that the order for demolition of the wall was passed without notice to the plaintiff. It was also submitted that there was no revenue document showing that Khasra No.74 was a street or a public path and since no

notice was issued to the plaintiff before taking action or before any demarcation was taken and therefore the order passed by the Commissioner, Municipal Corporation was illegal and plaintiff was entitled to the relief claimed by him.

On the other hand, learned counsel for the respondent submitted that no substantial question of law arises from the arguments raised by the learned counsel for the appellant. It was submitted that the question as to whether the notice was issued or not or demarcation was taken or not are not substantial questions of law, but these are facts and on facts the appeal cannot be admitted and the evidence cannot be re-appreciated by this court sitting in second appeal.

It is clear from the pleadings by the plaintiff in the plaint, that no issue was claimed by the plaintiff that the order of demolition passed by the Commissioner, Municipal Corporation without any notice or without taking demarcation was illegal and it be declared as an illegal order. In the absence of any issue having not been framed as to whether the order passed by the Commissioner, Municipal Corporation was illegal since no seven days' notice was given or that no demarcation was taken, the said order can not be set aside and the evidence led in this regard cannot be re-appreciated by this court, especially to hold whether any notice was issued or not or whether the demolition order was passed without taking recourse to the demarcation. Both these questions are based upon facts which were required to be specifically alleged, an issue should have been claimed by the plaintiff and then only the findings could have been recorded by the learned trial court or the first appellate court. However, since no specific issue was framed or claimed in regard to the vague pleadings of the plaintiff, no findings can be given by this court on re-appraisal of the evidence that the order was passed by the Commissioner without issuance of a seven days' valid notice or without taking demarcation of the land.

Apart from the above, it is clear from perusal of the judgments of the courts below that the plaintiff had field an appeal before the Divisional commissioner who gave an opportunity to the plaintiff to be heard when the case was remanded and the plaintiff was asked to furnish fresh plan which was not furnished by him as per the observations of the courts below. There is no evidence on record to show that the disputed wall was not over Khasra No.74 and the plaintiff has not been able to make out any case for re-appraisal of the evidence by this court. The facts of the case do not show that there was any misreading of evidence by the courts below and no substantial question of law arises to be framed by this court for admission of the appeal.

From the above discussion it is clear that no case is made out for admission of the appeal and as such the appeal is dismissed. The findings recorded by the learned first appellate court which are based upon correct appreciation of evidence are liable to be affirmed and the same are affirmed accordingly. No order as to costs.

April 27,2007(g) **(V.K.Ahuja),J.**